

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KIMBERLY D'ALONZO,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	NO. 06-1997
	:	
J.B. HUNT and MARVIN CLEMONS,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

DECEMBER 4, 2006

Presently before this Court are Plaintiff's Motion to Compel the production of Michael Duffy and enumerated documents, and Defendants' Motion for a Protective Order in regards to the deposition of Mr. Duffy. For the foregoing reasons, Plaintiff's Motion to Compel is granted in part and denied in part. Defendants' Motion for a Protective Order is denied.

BACKGROUND

This case concerns an automobile accident that occurred on April 2, 2004, at the intersection of Roosevelt Boulevard and Comly Road in Philadelphia. Defendant Marvin Clemons, driving a tractor owned by Defendant J. B. Hunt, was making a right hand turn onto Comly Road when he and Plaintiff Kimberly D'Alonzo collided. Ms. D'Alonzo was driving a Volkswagen Cabriolet and had two passengers with her in the car. Ms. D'Alonzo alleges that she suffered injuries in this collision. The police conducted an accident investigation. Shortly after the accident, J. B. Hunt instructed Michael Duffy, an independent adjustor, to conduct an on-scene inspection of the collision. Mr. Duffy inspected the scene, took pictures of the vehicles

and the intersection, and talked to various people including Mr. Clemons, Ms. D'Alonzo, and the other passengers in the car she was driving. He presented his findings to J. B. Hunt via written letters, the first of which he sent to them on April 12, 2004.

Ms. D'Alonzo filed her claim in the Philadelphia Court of Common Pleas on November 4, 2005. Defendants removed the action to this Court, a scheduling order was issued, and the parties began conducting discovery. Defendants provided redacted copies of Mr. Duffy's written reports to Ms. D'Alonzo. Defendants did not produce Mr. Duffy for a scheduled deposition. Ms. D'Alonzo now seeks to compel Defendants to (1) provide unedited copies of Mr. Duffy's investigation reports, (2) produce Mr. Duffy for a deposition, (3) provide the original prints of the photographs taken by Mr. Duffy of the scene, and (4) produce a written statement Mr. Clemons alleges to have given to J. B. Hunt.

DISCUSSION

I. Investigation reports prepared by Michael Duffy

Defendants do not need to provide unedited copies of Mr. Duffy's reports because those reports are protected by the work product privilege and Ms. D'Alonzo has not shown that she has the substantial need required to overcome that privilege. "The work product privilege, which derives from Federal Rule of Civil Procedure 26(b)(3), states that 'documents and tangible things otherwise discoverable,' but which were 'prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative' are not discoverable." Raso v. CMC Equip. Rental, Inc., 154 F.R.D. 126, 127 (E.D. Pa. 1994). Independent claims adjusters qualify as party representatives. 20 Charles A. Wright & Mary K. Kane, Federal Practice and Procedure § 87 (2002); see Raso, 154 F.R.D. at 129. "The protection given [to] . . . work product is not absolute; certain work product may be subject to compelled production upon a showing of

necessity by the party seeking discovery.” Delco Wire & Cable Inc. v. Weinberger, 109 F.R.D. 680, 689 (E.D. Pa. 1986). Overcoming the privilege requires that the party seeking discovery show that they have “substantial need of the materials” and are “unable without undue hardship to obtain the substantial equivalent of the materials.” Fed. R. Civ. P. 26(b)(3).

These reports were prepared in anticipation of litigation. “The relevant inquiry is whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” Maertin v. Armstrong World Indus., Inc., 172 F.R.D. 143, 148 (D.N.J. 1997). In this case, the document requested from Mr. Duffy involves his investigation of the accident at the request of J. B. Hunt. While no claim had yet been filed, the circumstances show that the document was drafted with an eye towards the prospect of a lawsuit. The automobile driven by the Plaintiff was seriously damaged, the police had completed a crash report, the occupants of the automobile involved were claiming that they were injured, and Defendants were in control of the other vehicle involved. Defendants contend that this was enough reason for them to foresee litigation in the future. This Court agrees, and finds that the Defendants have alleged facts sufficient to show that the reports prepared by Mr. Duffy are entitled to work product privilege available under Rule 26(b)(3).

Ms. D’Alonzo has not shown that she has a substantial need for copies of Mr. Duffy’s reports that include statements made by Marvin Clemons. The work product privilege applied to these documents will be upheld unless Ms. D’Alonzo can show that Mr. Clemons was unable to recollect the events of the accident during his deposition. Eoppolo v. Nat’l R.R. Passenger Corp., 108 F.R.D. 292, 295 (E.D. Pa. 1985). Ms. D’Alonzo alleges that Mr. Clemons was unable to accurately recall any part of the accident because there is a discrepancy between Mr. Duffy’s

report and Mr. Clemons deposition testimony. Mr. Duffy wrote in his report that he “spoke with the J. B. Hunt driver,” but Mr. Clemons stated that he did not have any conversations with Mr. Duffy. She incorrectly implies from this discrepancy that Mr. Clemons is unable to recall any detail of the accident, and therefore she must be provided with unedited reports. However, she never states that Mr. Clemons was unable to recall the facts of the collision. Quite the contrary, Ms. D’Alonzo says that he did give details. She just doubts his version of the story. She believes Mr. Clemons contrived his testimony. Unfortunately, all that this evidence shows is that there is a dispute about the facts between Plaintiff and Defendants. Ms. D’Alonzo has not shown that Mr. Clemons was unable to recollect. Rather, she has established that he was clearly able to recall the events of the accident on April 2, 2004. She seems to equate this factual dispute with an inability to recollect. However, her evidence refutes her claim that Mr. Clemons could not recall the accident. Differing versions of the facts does not establish that Mr. Clemons was unable to recall the events of the accident. Ms. D’Alonzo has not shown a substantial need for Mr. Duffy’s unedited reports, and therefore, her Motion to Compel production of the unedited reports is denied.

II. Deposition of Michael Duffy

A court may grant a protective order to protect parties and witnesses during the discovery process when good cause is shown. Fed. R. Civ. P. 26(c). The work product privilege protects only the documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative. Fed. R. Civ. P. 26(b)(3); 8 Wright, Miller & Marcus §§ 2024 (2nd ed. 1994). The work product privilege furnishes no shield against discovery by deposition of the facts that the adverse party has learned or the persons from whom such facts were learned. Eoppolo, 108 F.R.D. at 293. Mental impressions, even if not embodied

in documents, are not discoverable. Phoenix Nat'l Corp., Inc., v. Bowater U.K. Paper Ltd., 98 F.R.D. 669, 670 (N.D. Ga. 1983).

In the present case, Defendants state that a protective order precluding any deposition of Michael Duffy because he was retained in anticipation of litigation. This argument assumes a work product privilege that extends beyond what other courts have found. The work product privilege does not bar the deposition of an independent claims adjuster hired by an insurer to investigate an accident involving its insured. Raso, 154 F.R.D. at 130. While the work product privilege is applicable to deposition questions seeking to elicit information beyond the underlying facts, it cannot be used to bar questions about Mr. Duffy's knowledge of the facts of this litigation. Phoenix Nat'l Corp., Inc., 98 F.R.D. at 670. Defendants present no facts to this Court showing why Mr. Duffy's deposition must be barred completely. That he was not an eyewitness and his testimony being hearsay are not considerations that must be addressed at the discovery stage of litigation. "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible information." Fed. R. Civ. P. 26(b)(1). Deposition testimony of an independent adjuster seems reasonably calculated to lead to the discovery of admissible evidence. Defendants have not shown good cause as to why Mr. Duffy's deposition should be completely barred. Their Motion for a Protective Order is denied.

III. Photographs taken by Michael Duffy

The request for production of the original photographs taken by Mr. Duffy cannot be granted as Defendants have stated that these items are lost. J. B. Hunt has provided a sworn affidavit stating that the photographs were lost after being sent to storage. J. B. Hunt has also made a good faith effort to fulfill the request as best they can by providing photocopies of the pictures. As there is no way that these documents can be produced, Ms. D'Alonzo's Motion to

Compel production is denied.

IV. Statement of Marvin Clemons provided to “Faye”

Ms. D’Alonzo’s request for production of the letter written by Marvin Clemons to Faye at J. B. Hunt cannot be granted. J. B. Hunt has provided a sworn affidavit stating that they have no knowledge of the existence of any letter, note, or statement given to them by Mr. Clemons.

Defendant cannot be compelled to produce something that they do not have. Therefore, Ms.

D’Alonzo’s Motion to Compel production of this document is denied.

An appropriate Order follows.

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J.B. HUNT and MARVIN CLEMONS,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 4th day of December, 2006, upon careful consideration of Plaintiff's Motion to Compel (Doc. No. 15) and Defendants' Motion for a Protective Order and Opposition to Plaintiff's Motion to Compel (Doc. No. 16), it is hereby **ORDERED**:

1. Plaintiff's motion for production of unedited reports is **DENIED**;
2. Plaintiff's motion for production of Michael Duffy is **GRANTED**;
3. Plaintiff's motion for production of original photographs is **DENIED**;
4. Plaintiff's motion for production of the statement to Faye is **DENIED**; and
5. Defendant's motion for a protective order is **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY Sr. J.